May 18, 1942.

CONSTITUTIONALITY OF EVACUATION OF CITIZENS DURING WAR

The memorandum is not concerned with the power to evacuate or otherwise control alien enemies, or to punish any persons actually caught dealing with the enemy. The power of the Executive to deal with alien enemies is now established (Ex parte Gilroy, 257 Fed. 110 (S.D. N.Y.); Minotto v. Bradley, 252 Fed. 600 (N.D. Ill.); Ex parte Graber, 247 Fed. 882 (N.D. Ala.) ), while spies and the like are subject to the espionage laws (U.S. Code, Title 50, Sec. 31-42, 45, 45a-d) and probably to some of the Articles of War (Title 10, Sec. 1553, 1554.) Only the constitutional basis of the power of the President or Congress to require the evacuation of individuals or groups of persons, citizens and alien friends, whose loyalty is unproved or in doubt, is to be discussed.

The President's Executive Order No. 9066, dated February 19, 1942, authorized the Secretary of War, and the various military commanders from time to time designated by the Secretary of War, to exclude "any or all persons" from military areas specified by the Secretary or a designated military commander. The Secretary of War and the military commanders were authorized to take whatever steps they might deem advisable to enforce compliance with their exclusion orders. A fine and imprisonment were provided by Public Law 503 of the 77th Congress, 2nd Session, approved March 21, 1942, for any person entering, remaining in, leaving, or committing any act in any military area prescribed by the Secretary of War or a designated military commander contrary to the restrictions imposed by

either of them. Executive Order 9066 and Public Law 503 are the sources of the Secretary of War's authority to order evacuation and of the penalties for failure to obey orders issued thereunder. The Commissioners of the District of Columbia have a somewhat comparable power to compel the evacuation of any persons from the District of Columbia while the United States is at war. Such an evacuation is subject to the control of the Secretary of War, and is authorized by Public Law 373, 77th Congress, 1st Session, approved December 26, 1941.

The power to compel evacuation or otherwise to regulate the activities of citizens, although not expressly granted by the Constitution, must be among the so-called "war powers" of the Government. The war powers of Congress find their source principally in its power "to declare war". Constitution, Article I, Section 7(11). The President's war powers arise from his constitutional designation as "Commander-in-Chief" of the armed forces of the nation. Article II, Section 2(1). The Constitution itself contains no specific limitation on the aggregate of the war powers of the President and Congress. The war power has been called, by John Quincy Adams, "tremendous; * * * it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life." Annals of Congress, Volume XII, 24 Cong., 1st Session, May 25, 1836, pages 4038-9. The Supreme Court has said that the only limit on the war power is the "law of nations". Miller v. United States, 78 U. S.268.

The extent of the power of a nation to carry on war may be the measure of its power to preserve itself. Whatever limits the Constitution imposes upon Congress and the President in their prosecution of a war are limits on their power to defend the Constitution itself. In Federalist Paper No. 41 appears the statement: "It is in vain to oppose constitutional barriers to the impulse of self-preservation." Therefore, the Constitution could not logically impose any restriction on the power of the proper authorities to take whatever steps they may deem necessary for success in war. In Stewart v. Kahn, 78 U. S. 493, the Supreme Court stated that the measures to be taken in carrying on war or suppressing insurrection rest exclusively in the discretion of Congress and the President. Under the war power, for example, the property of aliens may be confiscated (Miller v. U. S., supra) and of citizens, although they are entitled to just compensation (Becker Co. v. Cummings, 296 U. S. 74). A military commander, acting as the agent or deputy of the President, may destroy property belonging to any persons if he deems it necessary for the successful prosecution of a military campaign, and there is no liability on the Government to restore or pay for such destroyed property. U. S. v. Pacific Railroad, 120 U. S. 227. In that case, the Supreme Court, in sustaining the destruction of bridges by a military commander, stated that "The safety of the State in such cases over-rides all consideration of private loss."

In Ex parte Milligan, 4 Wall. 2, the Supreme Court held that acts justifiable under the war power are nevertheless not proper in places where the war power does not apply. To this extent, the protection of the Fifth Amendment limits the war power. Louisville Bank v. Radford, 295 U. S. 555, 589. In the Milligan case, the military authorities in Indiana during the Civil War arrested a citizen of that State and tried him before a military commission. He was accused of inciting to insurrection and other disloyal practices, but statutory penalties existed for his acts. The regular courts, both Federal and State, were operating in their normal manner at the time. Milligan was found guilty and sentenced by the military commission. In an action for a writ of habeas corpus, the Supreme Court held that the military commission had no jurisdiction to conduct the trial. The Supreme Court recognized that such a trial would have been proper if actual martial law existed, but it found that martial law did not exist in the area and that the local courts were able to function. The Court did not recognize a need for martial law in Indiana at that time, although the authorities were preparing for a possible invasion by the Southern forces. The Court made the following observation:

> " If this position [that a military commander can rule all citizens and suspend civil rights] is sound to the extent claimed, then when war exists, foreign or domestic, and the country is sub-divided into military departments

> for mere convenience, the commander of one of them can if he chooses, within his limits, on the plea of necessity, with approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, if he thinks right and proper, without fixed or certain rules * * *
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> Martial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration."

Chief Justice Chase and three of the Associate Justices concurred in the granting of the writ of habeas corpus, but it was their opinion that Congress could, under its power to declare war, provide for trials of disloyal persons by military commissions. Since Congress had not so acted in this case, the trial was held without jurisdiction.

The Milligan case is one of the chief expositions of the war power. Its principal interest in connection with the present subject is its statement of the proposition that extraordinary powers which exist for the conduct of war may be used only when there is a real invasion, and not merely threatened. This portion of the opinion, however, dates the decision, since it recognizes only the type of war known in 1866. No court today would be likely to require military authorities to wait until parachutiests were actually overhead before steps necessary to control fifth columnists could be taken. It was precisely this distinction that Judge Black relied

upon in deciding that the Milligan case did not control his decision in the Ventura case, decided April 15, 1942, in the United States District Court for the Western District of Washington. The concurring opinion in the Milligan case suggests that the power of Congress is broader than the Executive's in dealing with disloyalty in war time.

The power of military authorities to control citizens was dramatically recognized in the Ex parte Vallandigham, Fed. Cas. No. 16,816 (28 Fed.Cas. 874) (Circuit Court, S.D. Ohio). General Burnside, the Commander of the Military Department of the Ohio, in 1863 issued General Order No. 38, warning that all persons declaring sympathies for the enemy would be arrested and tried or "sent beyond our lines into the lines of their friends". Vallandigham was charged with publicly expressing sympathy for the enemy.. After trial and conviction by a military commission, he brought an action for a writ of habeas corpus, but the court denied it. It was found that the military commander of the area had foreseen a danger of invasion and that his discretion was not subject to review by a civil court. The authority of the military authorities of the Commanding General was recognized by the Court because of the existence of the war. The Court felt that considerations of personal liberty were "not to be put into competition with the preservation of the life of the Nation". Thereafter, Vallandigham sought a writ of

certiorari in the Supreme Court to review the decision of the military commission, but the Court held that it had no jurisdiction. 1 Wall. 243. No appeal was taken from the decision of the Circuit Court on the habeas corpus issue. Subsequently, the President ordered Vallandigham sent beyond the Union lines, with instructions that he be arrested if he returned. This case appears to be an ideal precedent for individual exclusion orders, and no case has been found indicating that the Vallandigham decision was wrong.

The Ventura case involved an application by a citizen of the United States of Japanese ancestry, residing in Seattle, for a writ of habeas corpus in order to avoid her evacuation from that State. The District Court, on April 15, 1942, denied her application on two grounds: first, that the writ of habeas corpus was improvidently sought; and second, that the Federal Government has ample power to order the evacuation of any persons from any area when the appropriate authorities deem it necessary.

A Government that has power to require citizens to leave their regular occupations and homes and, after joining the armed forces of the nation, go to any part of the world at the risk of their lives, must have the power to require the same citizens to leave their homes and go to another part of the country, either on their own or under custody. The power to conscript for the Army has been upheld by the Supreme Court. Selective Draft Law Cases, 245 U. S. 366. The Court referred to the draft as exacting from

a citizen "the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the Nation". To move from a strategic area for the security of the nation may be no less a performance of a duty of contributing to its defense.

In Edwards v. California, 314 U. S. 160, the Supreme Court recently held that a state may not exclude indigent citizens and paupers from migrating within its borders. The majority of the court relied on the constitutional prohibition on barriers erected by states against interstate commerce. Justice Jackson, in a concurring opinion, expressed the opinion that a state may not prevent a citizen of the United States, merely because of poverty, from migrating "to any part of the land he must defend" in case drafted into the Army. Justice Jackson expressly stated that he was not considering whether Congress could prevent such migration. Since, as especially stated by a minority of the Court, the right to migrate to any part of the country is an incident of "national citizenship", it seems evident that Congress could limit the right to travel anywhere and other rights appertaining to such citizenship.

The war powers of Congress embrace the making of decisions on what should be done in order to prosecute a war to a successful conclusion. The power to declare war is said to include the power to carry it on. The President, and the military commanders constituting a part of the executive branch of the Government, determine how the war is to be conducted and how the decisions of Congress

are to be executed. For example, Congress has given the Secretary of War power to control and prohibit houses of ill fame in the vicinity of military camps. The exercise of this power through regulations has been sustained. Pappens v. United States, 252 Fed. 55 (C.C.A. 9th). In a similar manner, Congress has created sanctions in Public Law 503 for the violation of any order of the Secretary of War or a designated military commander acting under a Presidential Executive Order. This law constitutes a Congressional approval of the creation of military areas in which all persons, including citizens, may be restricted. It is clearly within the war power of Congress, just as Executive Order 9066 and the proclamations issued thereunder are within the war power of the Executive. Furthermore, Congress has heretofore imposed penalties for violation of orders or enactments of other authorities; this is not improper delegation. Under several Federal laws the only offense has been the doing of an act prohibited by state law, such as importing convict-made goods or liquor to be sold in a state which prohibited their sale. Ky. Whip & Collar Co. v. I.C.R.Co., 299 U. S. 334; Clark Distilling Co. v. Western Md.Ry.Co., 242 U. S. 311.

Persons aggrieved by exclusion orders and the like have generally resorted to suits for writs of habeas corpus in order to determine their rights. This has been true in England as well as the United States. Cecil T. Carr, "A Regulated Liberty" (1942) 42 Columbia L. Rev. 339. However, a prerequisite to a suc-

cessful suit for a writ of habeas corpus is the existence of actual restraint of a petitioner. If he is free to move about and appear in court himself, an action for habeas corpus is improvidently brought. Wales v. Whitney, 114 U. S. 564; In re Ventura, supra. Consequently, a person merely ordered to leave an area designated by a military commander, but not actually seized or restrained, has no standing to obtain a writ of habeas corpus from a civil court. After the order becomes effective, a failure to obey would be a violation of Public Law 503, and prosecution could be conducted by the Department of Justice in accordance with the usual procedure for breach of a law of the land. There would be no question of denial of a jury trial or any other constitutional right. The only inquiry to be made would be whether the military commander had reached his decision to order exclusion after inquiry and by following an orderly procedure and whether the defendant had violated the order. The defendant probably could also argue the unconstitutionality of the exclusion order or, after incarceration, in a habeas corpus action. However, the authorities would be on more substantial ground under these circumstances because the defendant would be accused of violating a law of Congress and an act of the Executive, both allegedly within the war powers. The decision of the local commanding officer, properly designated, to exclude a particular individual from an area that he deemed strategic would not be reviewable if based on his finding that the subject's loyalty was in doubt, and after consideration by the

commander or his staff of evidence in his possession. Presumably this evidence could be kept confidential.

Congress may, without transgressing any constitutional protection, provide that the considered decision of an executive officer in carrying out his duties shall be final and conclusive. United States v. Ju Toy, 198 U. S. 253. The only question subject to contest in a civil court is the jurisdiction of the official to act in the particular case. Ng Fung Ho v. White, 259 U. S. 109. Compare Johnson v. Sayre, 158 U. S. 109, where the Court first determined that a petitioner for a writ of habeas corpus was in the Navy and consequently subject to the jurisdiction of a court martial, and then held that the holding of the court martial on the merits was not subject to review. Even more pertinent is the rule that the decision of the President or of a state governor that invasion has started or is imminent is exclusively theirs and conclusive on all other persons. Martin v. Mott, U. S. 19. That case recognizes that the enemy could be in full possession of an area before a court could have reached a decision on the propriety of the executive's order. Justice Holmes, in Moyer v. Peabody, 212 U. S. 78, which involved the imprisonment by the militia without trial of a labor leader during a civil commotion, described the rationale of the rule in apt words (p. 85):

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

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